Col.). The result seems clearly correct. By means of the contract, A. attempts to commit a tort on C. It is well settled that a contract which will interfere with fiduciary relations is unenforceable, as tending to cause a tort on third persons.[5] So also a contract in fraud of creditors.[6] The same public policy should make invalid a contract which, to the knowledge of the parties, necessitates the breach of a prior contract.[7] The fact that there is knowledge of the prior contract is an important element, where the performances of the two contracts are mutually exclusive. If the party in the second contract were ignorant of the existence of the first, he should recover for breach of the second contract. It is a general rule that where the immediate consideration is not unlawful, and the illegality consists alone in an intention of one of the parties, unknown to the other, the innocent party is entitled to damages for a breach of the contract.[8]

TAXATION OF FOREIGN CORPORATIONS. — Although the taxation of corporations outside of the jurisdiction in which they are incorporated presents many difficult problems, there are certain rules which seem definitely established. Property within the jurisdiction may be taxed even though the corporation owning it be engaged in interstate commerce.[1] Though a state may not tax the right of a foreign corporation to do interstate business in its jurisdiction,[2] it may require as large a tax as it chooses as payment for the permission to come into the state and there carry on a local business. This follows because a state may exclude such corporations entirely, since not being citizens under Article IV, § 2, of the Constitution, they may not claim rights and privileges equal to those enjoyed by domestic corporations.[3] Since the tax is the price of the privilege of doing business, the basis upon which the amount is estimated makes no difference. Thus it is valid when estimated upon the entire capital stock of the corporation.[4] The same result would follow where a corporation engaged in interstate commerce sought the privilege of doing a local business separate from that of an interstate nature.[5]

A more difficult question is presented when the corporation has been admitted into the state, has established a business and acquired property.

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[5] Guernsey *v.* Cook, 120 Mass. 501; Noel *v.* Drake, 28 Kans. 265.

[6] Leicester *v.* Rose, 4 East 372.

[7] This would seem to be true, even though the second contract was not the sole cause of the breach of the first contract. Thus, B. makes an offer to contract with A., saying that at all events he will break his prior contract with C.; whereupon A. enters into the contract. The contract, it is submitted, is unenforceable, because it tended to cause a breach of the first contract. If a breach occurred, this second contract would be a proximate cause.

[8] Pixley *v.* Boynton, 79 Ill. 351. See WALD'S POLLOCK ON CONTRACTS, p. 485.

[1] Atlantic & Pacific Tel. Co. *v.* Philadelphia, 190 U. S. 160, and cases therein cited.

[2] International Text Book Co. *v.* Pigg, 217 U. S. 91.

[3] Paul *v.* Virginia, 8 Wall. (U. S.) 168.

[4] Pembina Mining Co. *v.* Pa., 125 U. S. 181; Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

[5] The converse of this situation, where the local business was inseparable, was presented in Western Union Tel. Co. *v.* Kansas, 216 U. S. 1, and the tax held an unconstitutional regulation of interstate commerce.

An early *dictum* of the Supreme Court declared that since a corporation is a mere creature of the law of the creating state, it can have no existence beyond the operation of that law.[6] But however that may be, recent cases recognize such a foreign corporation as a person doing business within the jurisdiction, and entitled to protection under the Fourteenth Amendment.[7]

What are the limitations of the taxing power of a state over such a corporation? If it has been admitted to do business upon payment of a single fee or annual sum, it would seem that anything further exacted as a price for such privilege would be unconstitutional under the contract clause.[8] Any tax other than a fee paid for admission into the state must be based on the general privilege of doing business, or on property, and when discriminatory should be invalid under the Fourteenth Amendment. In a case arising under an Alabama statute imposing on foreign corporations a franchise tax in addition to the privilege tax required of all business concerns, the state's legislation was declared to be unconstitutional because discriminatory.[9] But in the recent case of *Baltic Mining Co.* v. *Massachusetts*, 34 Sup. Ct. 15, the Supreme Court upheld a Massachusetts statute which imposed an excise tax solely upon foreign corporations. The court distinguishes the former case on the ground that there the plaintiff, a railroad company, had acquired a large amount of permanent property within the state, while in the principal case the corporation, having no permanent property, might be treated as one seeking admission. It is submitted that this distinction is not sound. One of the plaintiffs in the principal case was a trading corporation which had been doing business in the state for ten years. Its good will, being liable to taxation as property,[10] is as surely entitled to protection under the Fourteenth Amendment as a railroad depot or round-house.

For some purposes foreign and domestic corporations may be classed differently. For instance, since a state has not so much control over foreign corporations incurring debts in its jurisdictions, it may reasonably lay stricter precautionary regulations upon them. But such classification has nothing to do with taxation, and the making of such a distinction for this purpose has been declared fanciful.[11]

Aside from the discrimination, if the Fourteenth Amendment applies, the constitutionality under the Due Process Clause of laying a tax on a foreign corporation based upon its entire capital stock might raise a

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[6] Bank of Augusta *v.* Earle, 13 Peters 519, 588.

[7] Southern Ry. Co. *v.* Greene, 216 U. S. 400. And see the opinion of Mr. Justice White in Western Union Tel. Co. *v.* Kansas, *supra*; Pembina Mining Co. *v.* Pa., *supra*.

[8] If, as in some instances, the corporation is permitted to do business under a license renewable from year to year, it would seem arguable that having been properly admitted, such corporation was entitled to constitutional protection even after the license had expired. The contrary seems to have been held, but not without dissent, in Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110.

[9] Southern Ry. Co. *v.* Greene, *supra*.

[10] Adams Express Co. *v.* Ohio, 165 U. S. 194.

[11] Southern Ry. Co. *v.* Greene, *supra*. The Massachusetts court in deciding the principal case considered that the tax in fact laid no heavier burden on the foreign corporation. See White Dental, etc. Co. *v.* Commonwealth, 212 Mass. 35. The Supreme Court, however, clearly held that whether discriminatory or not, the tax was not unconstitutional. 34 Sup. Ct. 15, 20.

serious question. Even upon a domestic corporation, a personal tax based on property without the jurisdiction is invalid.[12]

The business done is a legitimate subject for taxation,[13] but a tax based on capital stock has no relation to the business done within the state. With a corporation doing a large interstate business, such a tax might be more than the receipts of the business itself. It would seem, therefore, on the reasoning suggested, that the result in the principal case is incorrect.

RECENT CASES.

ADVERSE POSSESSION — AGAINST WHOM TITLE MAY BE GAINED — RAILROAD COMPANY. — The plaintiff maintained, for more than the statutory period, a building which was an encroachment on the right of way of the defendant railway company. *Held*, that no title was acquired thereby. *Conwell* v. *Philadelphia & R. Ry. Co.*, 88 Atl. 417 (Pa.).

Where a railroad's right of way is limited to an easement over property the fee of which is vested in the sovereign, no title to the land can be acquired by adverse possession because of the public policy which excepts the sovereign's land from the operation of the Statute of Limitations. *Union Pac. Ry. Co.* v. *Kindred*, 43 Kan. 134, 23 Pac. 112; *Kindred* v. *Union Pac. R. Co.*, 168 Fed. 648. A like result is reached when the railroad is built on land in which the government, as grantor, has a possibility of reverter. *Union Pac. Ry. Co.* v. *Townsend*, 190 U. S. 267; *McLucas* v. *St. Joseph & G. I. Ry. Co.*, 67 Neb. 603, 97 N. W. 312. The principal case goes a step further by holding that a railroad right of way, as such, is exempt from the operation of the statute. The result is justified by the vital public interest in railroads which makes it fair to say that land devoted to their rights of way or terminal facilities is impressed with a public use. See *Hannibal & St. J. R. Co.* v. *Totman*, 149 Mo. 657, 662, 51 S. W. 412, 413. Little support is found to-day for the position taken by one court in reaching a conclusion contrary to the principal case, that railroads are operated primarily for the benefit of their stockholders. See *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Stickley*, 155 Ind. 312, 315, 58 N. E. 192, 193. The Statute of Limitations being no more than a rule of policy for the repose of titles, it seems correct to recognize an exception to it when, as here, the countervailing policy of the preservation of public rights is involved. No exemption is claimed for the general corporate property of the railroad. *Delaware, L. & W. R. Co.* v. *Tobyhanna Co.*, 228 Pa. 487, 77 Atl. 811. And it is submitted that cases holding that land originally secured for use as a right of way, but subsequently abandoned, may be acquired by adverse possession, are not inconsistent with the principal case. *Spottiswoode* v. *Morris & E. R. Co.*, 61 N. J. L. 322, 40 Atl. 505. Such property was obviously unnecessary for the performance of the public duty.

ALIENS — NATURALIZATION OF ALIENS — WHO IS A "FREE WHITE PERSON" WITHIN FEDERAL NATURALIZATION LAW. — The plaintiff applied for naturalization as a white person, maintaining that as a high caste Hindu of pure blood he was a member of the Aryan race. *Held*, that he is entitled to naturalization. *In re Akhay Kumar Mozumdar*, 207 Fed. 115 (Dist. Ct., E. D. Wash., N. D.).

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[12] Union Transit Co. *v.* Kentucky, 199 U. S. 194.

[13] See State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300, 319.